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Court refuses to hear dispute over requisitions due to self-induced urgency

By James R.G. Cook

James R.G. Cook
Partner
416.865.6628
jcook@grllp.com

Currently, the civil hearings list in Toronto is backlogged and suffering from what one Superior Court Justice has called "unacceptably long timeouts for civil motions and applications due to the effects of the pandemic and a lack of resources": *Nicholas v Ogniewicz*, 2021 ONSC 4442 (CanLII) at para. 13. While truly urgent matters are being heard on a case-by-case basis, parties should not expect to obtain hearings on an urgent basis for matters that don't involve the risk of physical injury, irremediable damage to property, misuse of confidential information, or the imminent failure of a business.

In the course of a real estate transaction, disputes may arise that would otherwise be amenable to judicial determination. The *Vendors and Purchasers Act*, for example, sets out a procedure for a court to determine the validity of requisitions submitted before closing. However, such a procedure depends on whether a hearing date will be available to hear the application.

In *Nicholas v Ogniewicz* the parties had entered into an agreement of purchase and sale on March 23, 2021, with an agreed completion date of June 25, 2021. The parties further agreed that the buyer had until June 11, 2021 – two weeks before closing – to submit requisitions.

On June 11, 2021, the buyer's lawyer submitted 21 requestions, which included several onerous requests including the replacement of the property's electrical system and removal of an underground oil storage tank. The sellers took the position that the deal was "as-is where-is" and that they were not required to fulfill the requisitions.

The buyer then sought to schedule an urgent one-hour hearing under the *Vendors and Purchasers Act* to have the court determine the validity of requisitions submitted on behalf of the buyer.

In rejecting the buyer's request, the court noted that "[s]elf-induced urgency is not 'urgent'." The alleged urgency was self-induced by both sides since the sellers had agreed to a requisition date that was two weeks before closing, even though the agreement had been signed

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months earlier. The buyer, in turn, waited too long to obtain the relief sought by way of the requisitions, since there was no practical way, the onerous requisitions could be physically accomplished before the closing date, even if the sellers agreed to the request.

In the court's view, if a buyer is not going to close, then there is a longer-term legal battle that should not and cannot be determined in a one-hour hearing. Conversely, if a buyer is just seeking an abatement of the purchase price, then that is a monetary issue and not urgent. As a result, the parties were not provided with an urgent hearing date.

An important takeaway for real estate transactions is that requisitions should be addressed by the parties as early as possible. As noted in the decision, the requisition date matters, and "is deferred at the parties' own risk."

For litigation participants generally, the decision offers an important judicial perspective on what types of matters are viewed as truly urgent. Disputes that are ultimately over money, even if there are deadlines that will impact the dispute, will not be permitted to "jump the queue" if the urgency is of the parties' own making.

Contact us

If you have a litigation matter and are in need of legal advice, please contact James Cook, at 416.865.6628 or jcook@grllp.com.

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